IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ERIE INSURANCE PROPERTY &
CASUALTY COMPANY, INC.,

Civil Action No. 09-CV-00113

Plaintiff,

vs.

CRAIG A. EDMOND, JANET EDMOND,
DREAMLAND DEVELOPMENT, LLC,
d/b/a PLEASANT DAY SCHOOLS,
LATASHA HENRY, DONNA
CALANDRELLA, CRYSTAL SMITH
and CHRISTINA HATCHER McGERVEY,

Defendants.

RESPONSE OF PLAINTIFF ERIE INSURANCE PROPERTY & CASUALTY COMPANY, INC. TO THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STAY OF DEFENDANTS LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH AND CHRISTINA HATCHER MCGERVEY

The Plaintiff, Erie Insurance Property & Casualty Company, Inc. (hereinafter "Erie"), by and through undersigned counsel, files this Response to the Motion Dismiss or, in the Alternative, Motion to Stay of Defendants Latasha Henry, Donna Calandrella, Crystal Smith and Christina Hatcher McGervey's (hereinafter collectively "Employees") and in support thereof, states as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 1, 2008, Employees filed a lawsuit in the Circuit Court of Monongalia County, West Virginia, naming Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools, as Defendants. *See*, State Court Complaint, Exhibit 1. In said Complaint, Employees allege that they were subjected to "inappropriate comments, inappropriate touching, and other inappropriate conduct from Mr. Edmond directed at the employees..." Id., at Paragraph 11. Employees further allege that Mr. Edmond made requests for sexual favors, exhibited conduct of a sexual nature and thereby created an intimidating, hostile and offensive work environment. Id., at Paragraph 19.

Eleven (11) separate causes of action are alleged in said Complaint. All Employees allege the following causes of action: Hostile Environment/Sexual Harassment, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Assault, Battery, False Imprisonment, and Invasion of Privacy. Employees Latasha Henry and Donna Calandrella also allege causes of action for Retaliatory Discharge and Wrongful Discharge in Violation of Public Policy. Employee Donna Calandrella also alleges causes of action for Breach of Contract and Violation of the Wage Payment and Collection Act. Finally, all Employees request punitive, or exemplary, damages. Id.

Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools, made a demand for coverage, indemnification and defense from Erie with respect to Policy #Q39-8050037W issued to Dreamland Development, LLC, d/b/a Pleasant Day Schools and on July 31, 2009, Erie filed a Complaint for Declaratory Judgment in this Court to obtain a determination of its rights and responsibilities arising out of the Policy at issue.

Ten (10) days after the filing of Erie's Complaint for Declaratory Judgment in this Court, Employees filed a Motion with the state Court requesting leave to Amend their Complaint so as to add a cause of action against Janet Edmond for Aiding and Abetting and on or about August 18, 2009, the state court granted the Motion and deemed the Amended Complaint filed as of said date. *See*, State Court Amended Complaint, Exhibit 2.

On or about October 16, 2009, Erie granted Employees an extension of time to file a responsive pleading. *See*, First Stipulation, Exhibit 3. On November 6, 2009, the date the Employees were to have filed their responsive pleading pursuant to the stipulation granted, Employees requested another extension of time within which to file their responsive pleading and Erie again granted their request. *See*, Second Stipulation, Exhibit 4.

On or about November 12, 2009, the day before Employees were required to file their responsive pleading pursuant to Erie's second granted extension of time, Employees filed a Motion for Leave to File a Second Amended Complaint in the underlying state court action. *See*, Motion, Exhibit 5. If their Motion is granted, Employees' Second Amended Complaint would lodge a claim for declaratory judgment against Erie.

It is notable that Employees' Motion for Leave to File a Second Amended Complaint was filed in the state court action almost four (4) months after Erie's Complaint for Declaratory Judgment was filed in this Court and almost two (2) months after Employees were served with Erie's Complaint.

It is also notable that Employees' Second Amended Complaint seeks to add to the state court action additional claims against Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools and add three (3) new Defendants with additional claims against each - - effectively returning the underlying state court action back to the starting gate. As of the filing of this document, the state court has not ruled upon Employees' Motion for Leave and the Second Amended Complaint has not been filed.

In the event the state court grants Employees' Motion for Leave to File a Second Amended Complaint, the underlying state court action would then be comprised of four (4) Plaintiffs, seven (7) Defendants, including Erie, and upwards of fifteen (15) counts. Of these fifteen (15) counts, only one pertains to Erie, the request for declaratory judgment. Furthermore, all of the other Defendants appear to be related entities and are joined to the underlying action based upon their alleged involvement in the alleged wrongdoing or because they have in some way profited from the alleged conduct. The potential declaratory judgment count against Erie in the Second Amended Complaint is absolutely distinct from the other claims raised therein.

Finally, it is also worth noting that the remaining Defendants to this action, namely Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools, have filed their Answer to Erie's Declaratory Judgment Complaint and have not affirmatively challenged the jurisdiction of this Court. Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools are the parties against whom this Complaint is primarily directed as they are the insureds under the policy in question.

II. ARGUMENT

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that a federal court "may declare the rights and other legal relationships of any interested party seeking such declaration." Erie acknowledges that this Court's jurisdiction over this matter is discretionary, however, believes that the facts of this matter support this Court retaining jurisdiction.

A. **Quarles Analysis**

The Fourth Circuit has held that "[a] federal district court should normally entertain a declaratory judgment action within its jurisdiction when it finds the declaratory relief sought (1) 'will serve a useful purpose in clarifying and settling the legal relations in issue,' and (2) 'will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" Nautilus Ins. Co. v. Winchester Homes, Inc., 15 F.3d 371, 375 (4th Cir. 1994) quoting Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 324 (4th Cir. 1937). Furthermore, "[i]t is well established that a declaration of parties' rights under an insurance policy is an appropriate use of the declaratory judgment mechanism." United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 494 (4th Cir. 1998).

In the present matter, Erie has requested that this Court declare the rights and responsibilities of the parties to an insurance contract. It is clear that the declaratory relief sought will serve a useful purpose by settling the legal relations at issue and will afford relief from uncertainty. As such, the factors set forth in Quarles favor this Court retaining jurisdiction and adjudicating the claims at issue in this matter. Employees do not dispute such a finding.

B. **Nautilus Analysis**

As a preliminary matter, it is clear that there is no rule forbidding a federal court from entertaining a declaratory judgment action brought to resolve issues of insurance coverage when there is an underlying state court action pending. Nautilus, 15 F.3d at

376. ("[T]the federal appellate courts have uniformly recognized that the mere pendency of a related tort action against the insured in state court does not in and of itself require a federal court to refuse an insurer's request for declaratory relief on coverage issues. Id. (citation omitted)). As such, the factors set forth in the Nautilus are merely designed to assist a district court's analysis of whether or not to hear a declaratory judgment action when a state court action is pending.

As stated above, the initial considerations of whether to hear this matter as set forth in Quarles favors this Court retaining jurisdiction and adjudicating this matter. Furthermore, Erie believes that an analysis of the Nautilus factors also favors this Court retaining jurisdiction.

1. State Interest

The first Nautilus factor to be considered is the "strength of the state's interest in having the issues raised in the federal declaratory action decided in state court." Nautilus, 15 F.3d at 377. This factor involves an analysis of the state's interest in deciding issues of West Virginia law and Erie's interest in a federal forum. Mitcheson v. Harris, 955 F.2d 235, 237 (4th Cir. 1992). "Reconciling these competing interests, the Fourth Circuit has consistently followed the rule that the state's interest, while important, is diminished if the state law issues are not novel, unsettled, difficult, complex, or otherwise problematic." First Fin. Ins. Co. v. Crossroads Lounge, 140 F. Supp. 2d 686, 695 (S.D. W. Va. 2001). The burden of proving that the instant declaratory judgment action involves novel, unsettled, difficult, complex, or otherwise problematic issues falls upon the moving party, in this case, the Employees and Erie believes the Employees have failed to meet their burden.

The central issue involved in the present case is whether Erie Policy #Q39-8050037W provides any benefits, coverage or duty to defend or indemnify for Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools against the claims of alleged sexual harassment and other intentional and illegal conduct asserted by Employees in the underlying state court action. A copy of Erie Policy #Q39-8050037W is attached herewith. *See,* Erie Policy, Exhibit 6.

Erie's Complaint sets forth multiple rationales to support its argument that it has no duty to defend and no duty to provide any benefits, indemnification or coverage pursuant to Erie Policy #Q39-8050037W. *See*, Erie Complaint, Exhibit 7. Through its detailed nineteen (19) page Complaint, Erie has set forth clear and unambiguous policy provisions and exclusions applicable to each claim alleged by Employees. Contrary to the argument set forth in Employees' Motion to Dismiss, this Court's consideration of this coverage case will not require it to venture off into uncharted territory fraught with "novel, unsettled, difficult, complex, or otherwise problematic" issues.

West Virginia law remains clear and settled that "Where the provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." W. Va. Fire Cas. Co. v. Stanley, 216 W.Va. 40, 602 S.E.2d 483 (2004). In addition, as for guidance regarding determinations of coverage issues arising from claims of sexual harassment and other intentional and illegal conduct, plenty of West Virginia Law is available to this Court. *See*, Smith v. Animal Urgent Care, 208 W.Va. 664, 542 S.E.2d 827 (2000); Municipal Mut. Ins. Co. of W.Va. v. Mangus, 191 W.Va. 113, 443 S.E.2d 455 (1994); Horace Mann Insurance Co. v. Leeber, 180 W. Va. 375, 376 S.E.2d 581

(1988); West Virginia Fire & Cas. Co. v. Stanley, 216 W.Va. 40, 602 S.E.2d 483 (2004); and Farmers & Mechanics Mut. Ins. v. Cook, 210 W.Va. 394, 557 S.E.2d. 801 (2001).

To circumvent the above, the Employees attempt to misdirect the Court through a tortured analysis of one of the theories of relief proffered by Erie in Count Five of its Complaint with hopes that in doing so, this Court will determine that they have met their burden. (Incidentally, it is significant that the Employees apparently concede that the balance of Erie's Complaint does not involve novel, unsettled, difficult, complex, or otherwise problematic issues.)

Employees argue that Erie Policy #Q39-8050037W covers their false imprisonment claim under CGL Coverage B, entitled *Personal and Advertising Injury*. Employees then question whether coverage for their false imprisonment claims is excluded by the *Employment Related Practices Exclusion*. Interestingly, Employees misdirect the Court again - - this time, away from applicable specific exclusions.

As noted in Paragraph 59 of Erie's Complaint, "personal and advertising injury" is defined in the Erie Policy #Q39-8050037W as injury arising out of, *inter alia*, false imprisonment. As noted in Paragraph 60 of Erie's Complaint, Erie Policy #Q39-8050037W specifically excludes coverage for "personal and advertising injury" if the injury was "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury" or if the injury "[arose] out of a criminal act committed by or at the direction of the insured." The Employees fail to inform this court that they acknowledge and contend that the alleged conduct was unlawful pursuant to the laws of the State of West Virginia." *See*, State Court Complaint, Paragraphs 74-75, Exhibit 1.

As *additional* support for Erie's contention that the false imprisonment claims are excluded under Erie Policy #Q39-8050037W, Erie relies upon the *Employment Related Practices Exclusion* and agrees with the Employees that the Fourth Circuit has addressed the use of an *Employment Related Practices Exclusion* in relation to claims of false imprisonment in Cornett Mgmt. Co., LLC v. Fireman's Fund Ins. Co., 332 Fed.Appx. 146, 2009 WL 1755912 (C.A.4 (W.Va.)). See, Cornett Opinion, Exhibit 8.

In the event this Court would determine the specific exclusions noted above are not determinative and that it must then analyze the use of an *Employment Related Practices Exclusion* in relation to claims of false imprisonment, it can proceed comfortably knowing the Fourth Circuit has recently determined that West Virginia law exists to assist the analysis.

Based upon the foregoing, Erie contends that this Court can determine and resolve the entirety of the rights and responsibilities of the parties to this insurance contract once the pleadings are closed by relying on well settled West Virginia law. The issues presented in Plaintiff's Complaint do not involve issues of state law that are particularly close, difficult, unsettled or complex.

Accordingly, Erie urges this Court to find that the first Nautilus factor weighs in favor of this Court retaining jurisdiction over this matter.

2. Efficiency

The second Nautilus factor to be considered is whether the issues presented in this declaratory judgment action can be resolved more efficiently in the underlying state action. The Nautilus court described this inquiry as follows:

> [T]he Supreme Court has directed us to focus primarily on "whether the questions in controversy between the parties to the federal suit ... can

> better be settled in the proceeding[s]" that are already "pending in the state court [s]." . . . This in turn requires careful inquiry into "the scope of the pending state court proceeding[s]," including such matters as "whether the claims of all parties in interest [to the federal proceeding] can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, [and] whether such parties are amenable to process in that proceeding."

Nautilus, 15 F.3d at 378-379, quoting Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942).

As stated before, the central issue involved in the present case is whether Erie Policy #Q39-8050037W provides any benefits, coverage or duty to defend or indemnify for Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools against the claims of alleged sexual harassment and other intentional and illegal conduct asserted by Employees in the underlying state court action.

As it currently stands, Erie is not a party in the underlying state court action and there are no issues between Erie and the declaratory judgment Defendants to be tried in underlying state court action.[1] Accordingly, Erie contends that resolution of the coverage issues can be more efficiently undertaken in this forum because Erie is not a party to the underlying state court action and the issues necessary for resolution of this coverage case are not before the state court.

Further, Erie contends that the coverage issues raised in this declaratory judgment action are distinct from the tort issues raised in the underlying state action and that the pendency of this coverage action will not result in undue interference with the underlying state court tort action. As described in more detail supra, Erie continues to believe that

[1] Of course, by way of procedural gamesmanship, the Employees are currently attempting to join Erie into the underlying state court action by way of their recently filed Motion for Leave to File a Second Amended Complaint in an obvious effort to have this Court weigh this Nautilus factor in their favor. It could be months before the underlying state court rules upon the Motion and any subsequent Motions.

this matter can be adjudicated based upon the subject policy and Employees' own averments.

Lastly, as stated above, the underlying state court action currently has three (3) Defendants and twelve (12) claims, none of which involve Erie. If Employees' Motion for Leave is granted and they are permitted to file their Second Amended Complaint, the state court case will return to the starting gate and begin with seven (7) Defendants and fifteen (15) counts, only one (1) of which will involve Erie. The state court action will become incredibly complex, drawn out and the ability of the state court to satisfactorily and efficiently adjudicate a declaratory judgment action will be surely compromised.

Because coverage issues should be resolved quickly and because Erie is not a party to the underlying state court action, Erie contends that this Court can adjudicate and resolve the coverage issues more efficiently and satisfactorily.

Accordingly, Erie urges this Court to find that the second Nautilus factor weighs in favor of this Court retaining jurisdiction over this matter.

3. Entanglement

The third Nautilus factor to be considered is whether the federal action will cause unnecessary entanglement between the federal and state courts.

The only issue before this Court is whether Erie Policy #Q39-8050037W provides any benefits, coverage or duty to defend or indemnify for Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools against the claims of alleged sexual harassment and other intentional and illegal conduct asserted by Employees in the underlying state court action. As stated supra, this issue is not before the underlying state court.

In addition, Erie is not a party in the underlying state court action and there are no issues between Erie and the declaratory judgment Defendants to be tried in underlying state court action.

As stated supra, Erie believes this declaratory judgment action can be adjudicated based upon the subject policy and Employees' own averments and that this Court's resolution of this action will have no bearing on the factual questions of liability pending in the underlying state court tort action. To the extent Employees argue that entanglement is present because this Court must determine Mr. Edmond's intent relative to the false imprisonment claims, in addition to Erie's position stated supra, Erie contends that because the clear and unambiguous language of Erie Policy #Q39-8050037W excludes coverage for "personal and advertising" injury in cases where the insured acted criminally and based on Employees' own assertions that Edmond's conduct was criminal, no such determination would be necessary.

Accordingly, Erie contends that resolution of the coverage issues herein will not result in unnecessary entanglement, that any entanglement is minimal and that this Court should find that the third Nautilus factor weighs in favor of this Court retaining jurisdiction over this matter.

4. Procedural Fencing

The final Nautilus factor to examine is whether the declaratory judgment action is being used as a device for procedural fencing. Nautilus, 15 F.3d at 377.

There was no state court declaratory judgment action against Erie in July 2009 when it filed its Complaint with this Court and there remains no declaratory judgment action in state court as of the filing of this Response to the Employees' Motion to Dismiss. On the other hand, Employees' procedural gamesmanship is set forth supra.

Accordingly, Erie contends that this Court should find that the final Nautilus factor weighs in favor of this Court retaining jurisdiction over this matter.

C. Response to Request for Stay

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that a federal court "may declare the rights and other legal relationships of any interested party seeking such declaration."

In the present matter, Erie has requested that this Court declare the rights and responsibilities of the parties to an insurance contract. It is clear that the declaratory relief sought will serve a useful purpose by settling the legal relations at issue and will afford relief from uncertainty. Further, based upon the foregoing, Erie contends that this Court can efficiently and satisfactorily determine and resolve the entirety of the rights and responsibilities of the parties to the subject insurance contract once the pleadings are closed by relying on well settled West Virginia law.

As argued previously, Erie presently believes that it could take years to obtain the relief it is seeking in this action if it is forced to pursue the relief in the underlying state court action. Such a delay would obviously subject all parties to higher costs and lingering uncertainty as they wait for a determination relative to the rights and responsibilities under the Policy at issue.

Accordingly, Erie opposes the Employees request for a stay of this declaratory judgment action.

III. CONCLUSION

For the reasons stated herein, Erie respectfully requests that this Honorable Court Deny the Motion to Dismiss and Motion to Stay and confirm its jurisdiction over this matter.

Respectfully submitted,

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Defendants.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Response of Plaintiff Erie Insurance Property & Casualty Company, Inc. to the Motion to Dismiss or, in the Alternative, Motion to Stay of Defendants Latasha Henry, Donna Calandrella, Crystal Smith and Christina Hatcher McGervey* has been served this 4th day of December, 2009, via ECF Filing and/or U.S. Mail, postage prepaid, to the following:

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